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RECORD, CASE NO. 14561.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., 699.

THE UNITED STATES, APPELLANT,

vs.

HENRY PITMAN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

FILED APRIL 2, 1891.

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1 Be it remembered that on the 11th day of September, A. D. one thousand eight hundred and ninety, the following petition was filed in the office of the clerk of the district court of the United States for the district of Rhode Island:

HENRY PITMAN
vs.
THE UNITED STATES.

Petition.

To the Hon. George M. Carpenter, district judge of the United States within and for the district of Rhode Island.

The petitioner, Henry Pitman, respectfully represents to this honorable court that he is and ever has since the 14th day of October, A. D. 1854, been clerk of the circuit court of the United States for the district of Rhode Island, and from that time to the 14th day of December, A. D. 1888, has been clerk of the district court of the United States for said district.

As such clerk he is by section 828 of the Revised Statutes entitled to a fee of five dollars a day for his attendance on said courts while actually in session.

Your petitioner was in attendance on the circuit court on the following days when court was in session, and was adjourned under section 672 to wit: In October, 1885, on the 3d day; in November on the 2d
2 and 13th days; in December on the 7th, 8th, and 29th days; in January, 1886, on the 8th & 30th days; in February on the 6th & 8th days; in October on the 5th, 9th, 11th, 12th, 14th, 15th, & 25th days; in November on the 2d, 3d, 4th, 5th, 6th, 13th, 27th, 29th, and 30th days; in December on the 10th, 13th, & 17th days; in January, 1887, on the 6th, 8th, 14th, 24th, 25th, 27th, & 31st days; in February on the 3d, 7th, 11th, 12th, 14th, 21st, 22d, 23d, 24th, 25th, & 26th days; in March on the 2d, 3d, 4th, 5th, 9th, 11th, 15th, 16th, 22d, 23d, & 24th days; in April on the 11th, 14th, 16th, 18th, 21st, 22d, 23d, 25th, 26th, 28th, 29th, & 30th days; in May on the 3d, 6th, 9th, 12th, 14th, 16th, & 20th days; in June on the 6th, 7th, 9th, 13th, 16th, 23d, 27th, 28th, & 30th days; in July on the 5th, 9th, 11th, & 14th days; in August on the 8th day; in June, A. D. 1889, on the 25th day.

Said petitioner was also in attendance on said district court, when it was adjourned as aforesaid under section 583 on the following days, to wit: In October 1886, on the 6, 19, and 27th days; in November on the 17th day; in December on the 1st day; in January, 1887, on the 5, 12, and 26th days; in April on the 13, 20, and 27th days; in May on the 11th day; in June on the 8, 15, and 29th days, being in all one hundred and eight (108), for which, under sections 672 and 583, as aforesaid, he became entitled to the sum of five hundred and forty ($540.00) dollars.

Said petitioner presented his accounts for said fees to the said circuit court, and said court thereupon caused to be entered of record orders approving the same, and also certifying that on the days above enumerated he attended court under said sections.

3 Notwithstanding the rendition of said services and the approval of the court of your petitioner's accounts therefor, and notwithstanding the fact that Samuel L. Blaisdell, esq., U. S. marshal, Mr. Van Dorn, the crier of said circuit court, and Mr. John Anderson, one of the bailiff's therefor, have received payment for attendance on said court for a portion of the days enumerated in said petition, as appears by their certificates hereto annexed, to which fact the attention of the First Comptroller of the Treasury has been called, yet the accounting officer of the Treasury declined to allow the same, and your petitioner's accounts for attendance on all of the aforesaid days remain unpaid.

No other action than as aforesaid has been had on this claim in Congress or by any of the Departments.

Your petitioner is the sole owner of this claim and the only person interested herein, and no assignment or transfer of this claim or any part hereof or interest therein has been made.

Your petitioner is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets. The petitioner is a citizen of the United States and has at all times borne true allegiance to the Government thereof, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

4 Your petitioner verily believes the facts as stated in this petition to be true, and he demands judgment for five hundred and forty ($540.00) dollars.

And your petitioner will ever pray.

HENRY PITMAN,
Clerk Circuit Court.

Subscribed and sworn to before me this 29th day of April, 1890.

HENRY MARSH, JR.,
U. S. Commissioner,
District of Rhode Island.

Certificates attached to petition.

CIRCUIT COURT OF THE UNITED STATES,
District of Rhode Island:

I hereby certify that I have received payment for attendance in court on the following days, when court was adjourned under section 672:

For the quarter ending March 31, 1887: January 6, 8, 14, 24, 25, 27, 31; Feby. 3, 7, 11, 12, 14, 21, 22, 23, 24, 25, 26; March 2, 3, 4, 5, 9, 11, 15, 16, 22, 23, 24.

For the quarter ending June 30, 1887: April 11, 14, 16, 18, 21, 22, 23, 25, 26, 28, 29, 30; May 3, 6, 9, 12, 14, 16, 20; June 6, 7, 9, 13, 16, 23, 27, 28, 30.

For the quarter ending September 30, 1887: July 2, 5, 9, 11, 14; August 8.

63 days.

(Signed:)

JOHN ANDERSON, *Bailiff.*

(Signed:)

HENRY VAN DORN, *Crier.*

I hereby certify that I have received payment for attendance in
5 court on the following days, when court was adjourned under section 672, viz:

April 11, 14, 16, 18, 21, 22, 23, 25, 26, 28, 29, 30.
May 3, 6, 9, 12, 14, 16, 20.
June 6, 7, 9, 13, 16, 23, 27, 29, 30.
28 days.

(Signed:)

SAM'L L. BLAISDELL,
U. S. Marshal.

Affidavit of service of foregoing petition.

Filed on the 11th day of September, 1890.

CIRCUIT COURT OF THE UNITED STATES,
District of Rhode Island, ss:

I, Henry Pitman, clerk of said court for said district, do hereby make affidavit and on oath say, that on the 11th day of September, 1890, I served a copy of my petition against the United States for my per diem accounts upon Rathbone Gardner, esq., United States district attorney, which petition was filed in the clerk's office of the United States district court for said district on the 11th day of Sept., A. D. 1890, and have also sent a copy of said petition by mail (registered mail) to the Attorney-General of the United States on said 11th day of September, 1890.

HENRY PITMAN,
Clerk U. S. Circuit Ct.

Sworn to before me this 11th day of September, 1890.

WILLIAM P. CROSS,
Clerk U. S. District Court.

6 And on the 7th day of November, A. D. 1890, the following order was entered:

Upon the motion of the attorney for the United States it is hereby ordered that the time within which an answer to the above petition may be filed be, and is hereby, extended to December 10, A. D. 1890.

By the court this 7th day of November, A. D. 1890.

WILLIAM P. CROSS,
Clerk.

I assent to the entry of the above order.

HENRY PITMAN.

The following amendment to the petition was filed on the 13th day of December, 1890:

By leave of court the petitioner desires to amend his petition by striking out from the original petition the following days therein charged for attendance upon the circuit court, to wit, October 3d, November 2d, 13th, December 7th, 8th, 29th, in the year 1885, and November 3, 1886, and adding the following days for attendance upon said court, to wit, August 30 & 31, September 2, 3, 13, 17, 21, 25, 27, 28, and 30, in 1886, and

March 21st, 1887, making ninety-six days for attendance upon the circuit court and fifteen days for attendance upon the district court under section 672 and 583, for which he claims he is entitled to the sum of five hundred and fifty-five dollars instead of the sum of five hundred and
7 forty dollars, as claimed in his original petition.

Respectfully submitted.

HENRY PITMAN.

Assented to.

RATHBONE GARDNER,
U. S. Attorney.

Upon the 16th day of December, A. D. 1890, the following answer of the United States attorney for the district of Rhode Island, on behalf of the United States, was filed:

Answer.

And now comes Rathbone Gardner, attorney of the United States within and for the district of Rhode Island, on behalf of the United States, and makes answer to the petition of the claimant herein, and not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States is indebted to the said claimant in the sum of five hundred and fifty-five dollars, says that it is not indebted to said claimant in said sum of money or any part thereof.

And as to so much of said petition as sets out and avers that said claimant is entitled as clerk of the circuit court of the United States within and for said district of Rhode Island to a fee of five dollars per day for his attendance upon said court on August 30th and 31st, and September 2d,
8 3rd, 13th, 17th, 21st, 25th, 27th, 28th, and 30th, in the year 1886, said attorney for the United States avers that said claimant has rendered to the accounting officers of the United States his account for said fees, and that such account has been duly allowed by them, and that the full amount claimed by said claimant has been paid to said claimant by said United States for his attendance on said days.

And as to so much of said petition as sets out and avers that said claimant is entitled to a fee of five dollars per day for attendance in said court as clerk of said court on each of the days mentioned in said petition and upon which said claimant avers that he was in attendance upon said court (other than the days mentioned in the last paragraph), said attorney of the United States avers that said circuit court was not actually in session on said days or on any or either of them, and further that said court was not on said days or on any or either of them adjourned in accordance with the provisions of section 672 of the Revised Statutes of the United States.

And as to so much of said petition as sets out and avers that said claimant is entitled to a fee of five dollars per day for attendance in the district court of the United States within and for said district of Rhode Island as clerk of said court on each of the days mentioned in said petition and upon which said claimant avers that he was in attendance upon said court,

said attorney of the United States avers that said district court was
9 not actually in session on said days or on any or either of them, and further that said court was not on said days or on any or either of them adjourned in accordance with the provisions of section 583 of the Revised Statutes of the United States.

RATHBONE GARDNER,
U. S. Attorney.

This petition came on to be heard on the 5th day of January, 1891, and was argued by counsel for the respective parties, and upon the 16th day of February, A. D. 1891, the following findings of fact, conclusions of law, and the opinion of the court was filed:

Findings of fact and law.

Upon hearing the parties herein and their respective allegations and proofs, I find as follows:

That the petitioner, Henry Pitman, was clerk of the district court of the United States for this district from October 14, 1854, to December 14, 1888, and of the circuit court of the United States for this district from October 14, 1854, to the day of the filing of this petition, being September 11, 1890.

That the sixth and eighth days of February, the fifth, ninth, eleventh, twelfth, fourteenth, fifteenth, eighteenth, and twenty-sixth days of October, the second, fourth, fifth, sixth, thirteenth, twenty-seventh, twenty-ninth, and thirtieth days of November; the tenth, thirteenth, and
10 seventeenth days of December, in the year 1886; the sixth, eighth, fourteenth, twenty-fourth, twenty-fifth, twenty-seventh, and thirty-first days of January; the third, seventh, eleventh, twelfth, fourteenth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, and twenty-sixth days of February, the second, third, fourth, fifth, ninth, eleventh, fifteenth, sixteenth, twenty-first, twenty-second, twenty-third, and twenty-fourth days of March; the eleventh, fourteenth, sixteenth, eighteenth, twenty-second, twenty-third, twenty-fifth, twenty-sixth, twenty-seventh, twenty-ninth, and thirtieth days of April; the third, sixth, ninth, twelfth, fourteenth, sixteenth, and twentieth days of May; the sixth, seventh, ninth, thirteenth, sixteenth, twenty-third, twenty-seventh, twenty-eighth, and thirtieth days of June; the fifth, ninth, eleventh, and fourteenth days of July, and the eighth day of August, in the year 1887, and the 25th day of June, in the year 1889, were days on which sessions of the said circuit court were appointed to be holden by the presiding judge thereof, and that the said Pitman attended on said days at the time and place of holding said court accordingly, and that no judge was present to preside at said court on said days, and that said court on said days was adjourned by and pursuant to a written order signed by one of the judges of said court and directed alternatively to the marshal and in his absence to the clerk, to a day and time fixed and limited in said order, and that the said Pitman has not been paid the fee fixed by law for attend-
11 ance in court in respect of said days, and that his claim therefore has been rejected and disallowed by the officers of the Treasury.

That the sixth, nineteenth, and twenty-seventh days of October, the seventeenth day of November, and the first day of December in the year

1886; the fifth, twelfth, and twenty-sixth days of January, the thirteenth, twentieth, and twenty-seventh days of April, the eleventh day of May, the eighth and twenty-ninth days of June in the year 1887, were days on which sessions, terms, and sittings of the said district court were appointed to be holden by the presiding judge thereof; and that the said Pitman attended on said days at the time and place of holding said court accordingly; and that no judge was present to preside at said court on said days; and that said court on said days was adjourned by the marshal by virtue of a written order directed to him by the judge of said court, and signed by said judge to a day and time fixed and limited in said order; and that the said Pitman has not been paid the fee fixed by law for attendance in court in respect of said days, and that his claim therefor has been rejected and disallowed by the officers of the Treasury.

That as matter of law on the facts above found the said Henry Pitman is entitled to receive and be paid out of the Treasury of the United States the sum of five dollars for his attendance on each of said days, be-
12 ing in the whole the sum of four hundred and ninety-five dollars, and to have judgment for the same accordingly.

Dated the 16th day of February in the year 1891.

G. M. CARPENTER, *J.*

Opinion of the court.

CARPENTER, J.: The problem in this case is to ascertain the meaning of the words "regular, adjourned, or special term" (Rev. Stat., sec. 583). In literal meaning and the earliest use of the word it signifies a definite period of time during which the court remains in continuous session. There is, however, nothing here implied which will exclude a session consisting of a single day. The term is that session of the court which begins at a time fixed by or under authority of law, and, having proceeded continuously, ends when the business then under consideration is concluded.

The statutes provide in what manner special and adjourned terms may be called, giving particular directions as to certain districts, and providing in general terms, which cover the case of this district, that special terms or sessions may be held at the appointment of the judge (Rev. Stat., sec. 581 and 669). It is contended on behalf of the United States that the language of these sections, as well as of other sections, in which the same words are used, implies a continuous session, at a time separate
13 from the time of the regularly appointed term, and not during the continuance thereof. There is no doubt that the words used in these sections were written in view of such an arrangement of the sessions, because in many if not in most cases at the present time, and no doubt in all cases at the time these sections were originally framed, it was the habit of the courts to meet at the time appointed by law, and, having remained in session a few days, to adjourn to the next succeeding day fixed by law for a regular term and in like manner to adjourn each special term, whenever it became necessary to hold such. The terms or sessions, for there seems to be no distinction made between the two words, were therefore marked off from each other by considerable intervening spaces of time

within which no session of the court was held. At the present time the convenience of litigants and of the public business requires a different arrangement of the sessions of the court; and in this district it has been found most conducive to the public interest that the courts shall meet at the time fixed by law and transact such business, as may then appear, and thereafter shall hold by successive adjournments and appointments at short intervals a substantially continuous session until the next succeeding day for the commencement of a regular term. During the continuance
14 of these sessions the judges have attended in court here whenever their engagements did not take them elsewhere, and on the occasion of their absence or expected absence, for a time which might be definitely fixed, or which was indeterminate by reason of the doubtful exigencies of business elsewhere, they have sometimes, as in this case, made provision for adjournments according to the terms of sections 583 and 672.

The question here raised is whether those sections are inapplicable by reason of the fact that the sessions so adjourned by written order consisted of only one day, or by reason of the fact that they were not separated by any considerable interval from the preceeding regular term, or by reason of the fact that they were held between the day when a regular session was begun and the day when that session must give place by an adjournment to the next regular session. In answer to this question it is to be observed that the language of the statute is broad enough to include this case. Special sessions are not in terms required to be held of any particular length or to be held at any particular time. The time when they are to be held is not mentioned in the provision as to circuit courts; and they are provided to be held "at such times as may be ordered," in the case
15 of district courts. And when the purpose and spirit of the statute are considered I think it clearly appears that the provisions of these sections are applicable to the case under consideration. The purpose of those provisions is evidently first that the regular and orderly sequence of sessions and of the record thereof shall not be interrupted by the absence of the judge; secondly, that counsel, witnesses, and parties who may desire to attend, and court officers whose duty it is to attend, may be notified by an authentic act at what time the session will be resumed. These are equally important in cases where the sessions are short, frequently interrupted, and frequently resumed, as they are in cases where the sessions are longer, less frequent, and separated by intervals of time longer and more distinct. In the absence therefore of any express words of limitation of sections 583 and 672, I am of opinion that they apply to the days in question.

To state my opinion in another form. I think the words "the commencement of any regular, adjourned, or special term," in section 583, and "any regular or adjourned or special session," in section 672, refer to any day at which a court is appointed to sit, whether by regular appointment in the statute or by adjournment or special appointment by order of the judge and pursuant to law.

16 The judgment will therefore be that the clerk recover his fees for ninety-nine days at five dollars a day, amounting to four hundred and ninety-five dollars.

The following decree was entered on the 17th day of March, A. D. 1891:

This cause came on to be heard on the 5th day of January, A. D. 1891, and was argued by counsel for the respective parties, and before consideration thereof it is hereby, on this 17th day of March, A. D. 1891, as of the 16th day of February, A. D. 1891, ordered, adjudged, and decreed that the said petitioner, Henry Pitman, have and recover of the United States the sum of four hundred and ninety-five dollars.

By the court this 17th day of March, 1891.

Attest:

WILLIAM P. CROSS,
Clerk.

Thereupon the following application for appeal was filed on the 17th day of March, A. D. 1891:

From the judgment rendered in the above-entitled cause on the 17th day of March, A. D. 1891, in favor of claimant the defendant, by its attorney for said district of Rhode Island, on this seventeenth day of March, A. D. 1891, makes application for and gives notice of an appeal
17 to the Supreme Court of the United States, Rathbone Gardner, United States attorney.

And the following order was entered on above application on the 18th day of March, A. D. 1891:

Ordered by the court that an appeal be allowed in the above-entitled cause to the Supreme Court of the United States.

By the court this 18th day of March, A. D. 1891.

WILLIAM P. CROSS,
Clerk.

I, William P. Cross, clerk of the district court of the United States for the district of Rhode Island, do hereby certify that the foregoing is a true copy of all the proceedings and record in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Providence, in said district, on this the 20th day of March, in the year one thousand eight hundred and ninety-one.

[SEAL.] WILLIAM P. CROSS,
Clerk.

(Indorsement on cover:) No. 699. The United States, appellant, vs. Henry Pitman. Filed April 2, 1891. Rhode Island, D. C. U. S.

147 U.S. 669

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, APPELLANT,
vs.
HENRY PITMAN.
} No. 699.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

BRIEF FOR APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, APPELLANT,
vs.
HENRY PITMAN.
No. 699.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

BRIEF FOR APPELLANT.

STATEMENT.

The petitioner in the court below brought suit against the United States for per diem fees of $5 as clerk of the district court of the United States for the district of Rhode Island for the days set forth in his petition. He obtained judgment against the defendants in the sum of $495.

It appears that claimant attended at the place of holding court each of said days, and that on none of them was the court actually in session. The court had been ad-

journed to meet on said days, but, no judge being present to preside, it was adjourned each day by and pursuant to a written order signed by the judge and directed to the marshal or the clerk of the court.

Part of the claim accrued before the passage of the *Act of March* 3, 1887, chap. 362 (24 Stat. L. 509). The record does not show the date of rejection of the claim by the accounting officers.

It does not appear in the petition or findings that the claimant was in fact both circuit court clerk and district court clerk; but it appears from the "Registers of the Department of Justice" that he was clerk of both courts until December 12, 1888, and that on and after that date he was, and still is, clerk of the circuit court only.

> In this country notice is taken of the appointment of members of the Cabinet, the election and resignation of Senators, and of the appointment of marshals and sheriffs. (*Brown et al.* v. *Piper*, 91 U. S., 43.)

We assume, therefore, that this court will take notice of the appointments of clerks of the United States courts.

ASSIGNMENT OF ERRORS.

1. The court below erred in its conclusion of law, on the facts found, that appellee is entitled to receive and be paid out of the Treasury of the United States, the sum of $5 for his attendance on each of said days.

2. The court below erred in ordering, adjudging, and decreeing that appellee should have and recover of the United States the sum of $495.

ARGUMENT.

The question here presented must, we respectfully submit, be decided according to the following provision of the Revised Statutes of the United States and the act of March 3, 1887, above cited:

CLERK'S FEES.

Section 828 provides a fee for the clerk of "five dollars a day for his attendance on the court while actually in session."

In the case at bar it has been found as a fact that on none of the days charged for by the clerk was a judge present to hold court.

Can it be said that a court is actually in session with no judge present? If it were possible to suppose such a thing as a constructive session of a court in the absence of the judge or judges who is or are unable to attend, and who has or have given notice to the proper officers of the court of his or their inability to attend the term or session according to previous appointment, it would not help this case, because the fee is only for attendance while the court is "actually in session." Hence no construction that would give a fee when the court is not actually in session is permissible, except, perhaps, as to so much of the claim as may be authorized by the act of March 3, 1887, *post*. So strictly limited is this fee that it is not allowable even on rule days when the court is actually in session (Rev. Stat., 831). The legislature alone can afford relief in such a case as that here presented, and perhaps this has been afforded, in part.

The provisions in section 1 of the sundry civil appropriation act of March 3, 1887, paragraph 8, above referred to (24 Stat. L., 509, 541), emphasises the prohibition of the above-cited sections. It declares:

> Nor shall any part of any money appropriated be used in payment of a per diem compensation to any attorney, clerk, or marshal for attendance in court except for days when the court is open by the judge for business, or business is actually transacted in court, and when they attend under sections five hundred and eighty-three, five hundred and eighty-four, six hundred and seventy-one, six hundred and seventy-two, and two thousand and thirteen of the Revised Statutes, which shall be certified in the approval of their accounts.

The ruling in the Court of Claims in *Converse* v. *United States* (26 C. Cls. R., 6) as to the intention of the said act of 1887 is against the allowance of any per diem after that date for any day except a day "when the court is opened by the judge *and* business is actually transacted." It is proper, however, to say that the question of attendance under sections 583, 584, 671, 672, 2013, when the court is not open by the judge for business and no business is actually transacted, was not involved in that case. If there are three exceptions to the prohibition instead of one only in the act of 1887 appellee may be entitled to recover under the third exception so far as that act affects the case.

In the case of *McMullen* vs. *United States* (24 C. Cls., p. 394), which has been affirmed at the present term of the Supreme Court (Dec. 5, 1892), the claim was for a per

diem fee for the attendance of the marshal during a term of the court on days when the court was not actually in session, and the Court of Claims decided against the claimant. The above-quoted provision was discussed in the opinion, and held that its effect was to restrict the allowance of per diem fees, rather than to allow for days which had been previously allowed by the accounting officers, namely, Sundays and holidays.

We freely admit that possibly the case at bar may be regarded as presenting a somewhat different question than that passed upon in the McMullen case. It does not appear that any of the days charged for in the latter case were days when the marshal or clerk had attended under the sections of the Revised Statutes enumerated in said paragraph of the appropriation act of 1887, namely, sections 583, 584, 671, 672, 2013. Besides, Mr. McMullen's term of office as marshal ceased on July 24, 1885, and of course prior to the enactment of the act of March 3, 1887. If the court should now consider that this act contemplates the allowance of per diem fees to officers of the courts attending under said sections 583, 584, 671, 672, and 2013, on and after March 3, 1887, we would waive the statutory requirement that the *fact* of such attendance should be certified in the approval of the accounts of appellee, as it sufficiently appears in the findings of fact that he did so attend on the days charged for after March 2, 1887.

From the findings of fact it appears that of the days claimed 98 have been allowed, which, at $5 a day, would amount to $490, instead of $495, as allowed in the findings and judgment.

It appears further that the days allowed for after March 2, 1887, are as follows :

In the circuit court, forty-four days ;

In the district court, six days.

That is to say, fifty days in all, after March 2, 1887.

But even though the court should hold as matter of law that appellee is entitled to recover per diem compensation for attendance under said sections of the Revised Statutes, after March, 1887, it is respectfully submitted that he ought not to recover therefor in this suit, because it does not appear as a fact that the district court was not in session on the days allowed in the findings for attendance at the place of holding the circuit court, and that the circuit court was not in session on the days above allowed for attendance at the place of holding the district court. If in session, and paid therefor, the claimant was not entitled to recover under the provisions of section 831, Revised Statutes. The United States can only be sued with its consent and to the extent it has so consented. To enable a claimant to recover against the United States he must show his claim to be within the terms of the consent and the laws giving him the right to recover ; and in this case the claimant, as clerk, had no right to per diem compensation for adjourned days of the circuit court if the district court was in session on the same day, and *vice versa*. His right is dependent upon the receipt of no per diem for that day from either source, which does not here appear.

II.

AS TO THE SECOND ASSIGNMENT OF ERROR.

1. The judgment is erroneous not only for the foregoing reasons, but also for the following, to wit:

It does not appear that the payment of said judgment, or any part thereof, together with the emoluments of office paid to appellee on the adjustment of his accounts at the Treasury Department, exclusive of his authorized expenses of office, would not exceed the maximum compensation fixed by law for his office. This objection has been made and discussed in the brief for appellants in *United States* v. *Fletcher* (No. 783), pending in this court, and submitted at this term under Rule 20, and which we most respectfully ask the court to consider as a part of this brief upon this assignment of error.

2. In so far as the judgment includes the allowance of per diem fees for any day prior to March 3, 1887, there was no jurisdiction in the court below to render a judgment therefor. As this question will be considered in the case of *United States* v. *Harmon* (No. 649), pending an appeal in this court, and submitted at the present term under Rule 20, it is unnecessary to discuss it here.

Respectfully submitted.

FELIX BRANNIGAN,
Assistant Attorney.
CHARLES H. ALDRICH,
Solicitor-General.

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Office Supreme Court U. S.
FILED.
NOV 28 1892
JAMES H. McKENNEY,
CLERK.

RECORD, CASE NO. 14561.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., 699.

THE UNITED STATES, APPELLANT,

vs.

HENRY PITMAN.

BRIEF OF HENRY PITMAN, Appellee.

RECORD, CASE NO. 14561.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., 699.

THE UNITED STATES, APPELLANT,

vs.

HENRY PITMAN.

BRIEF FOR HENRY PITMAN.

This cause comes up by appeal from the District Court of the United States for the district of Rhode Island.

Henry Pitman, Clerk of the United States Circuit Court, and District Court for the district of Rhode Island, brought his petition before the Hon. George M. Carpenter, Judge of the United States District Court, for the allowance of his fees as clerk of the Circuit and District Courts for the days mentioned in his petition.

The petition was duly heard before Judge Carpenter, whose judgment was that Henry Pitman recover his fees for 99 days at $5 a day, amounting to $495.

From the judgment rendered by Judge Carpenter an appeal was taken to the Supreme Court of the United States.

The petitioner is entitled to an allowance of $5.00 for each day's attendance upon court under the provisions of the Revised Statutes of the United States, sec. 828.

The provisions of the Revised Statutes, sections 583 and 672, apply to any day to which the court has adjourned, and at which the judge is not present. To say that the clerk was not entitled to his fees when the court was regularly adjourned to a certain day, because the judge was not present or no business transacted, would be manifestly unjust and inequitable.

The clerk does not know whether the judge will be present or whether any business will be transacted, but he is bound to leave any other employment and be present in court. It is also manifest that in the view of Congress the courts of the United States may be in session in the absence of the judge. (Revised Statutes 583 and 672.)

Appropriations have also been made by Congress for the payment of clerks for attendance when the court is adjourned under the provisions of these sections 24, statutes at large, 541.

The clerk also respectfully refers the court to the opinion of Judge Carpenter in his case, which is made part of the record.

Henry Putnam per Le,

147 U S 672

RECORD, CASE NO. 13972.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No. 312.

THE UNITED STATES, APPELLANT,

vs.

RICHARD JONES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

FILED FEBRUARY 20, 1890.

RECORD, CASE NO. 13972.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO. 312.

THE UNITED STATES, APPELLANT,

vs.

RICHARD JONES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

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1 District court of the United States for the southern district of Alabama.

RICHARD JONES
vs. } 40. At law.
THE UNITED STATES.

Petition of Richard Jones for fees disallowed him as clerk.

To hon. district court:

The petition of Richard Jones respectfully shows to the court that he is a resident of the city of Mobile, in this southern district of Alabama, and he was duly appointed clerk of the United States district court of said district, qualified, and was in the due performance of his duties from July 1st, 1887, to December 31st, 1888, both inclusive.

That as such clerk he has within said period performed sundry services for the United States for which fees are allowed him by law against these defendants; that he has from time to time duly made up his accounts of fees, presented the same to this court in the presence of Hon. Jno. D. Burnett, district attorney; that said accounts were approved by the court, and thereupon by this petitioner duly rendered the accounting officers of the defendants at Washington; duplicates thereof were filed in this court in accordance with law.

Petitioner shows that the greater portion of said accounts was allowed by said defendants as presented, but that sundry items were dis-
2 allowed and refused payment, amounting in all to $276.75. An itemized statement of the charges so disallowed is hereto annexed as Exhibit A and prayed to be taken as a part of this petition. Petitioner shows that the disallowances so made are on file in this court, and a copy of the statement thereof, so far as effects the fees now sued for, is hereto attached, marked Exhibit B, and prayed to be taken as a part of this petition.

Petitioner shows that the services for which fees were so disallowed were duly rendered defendants and the fees charged were in strict accordance with law, and he hereby claims said fees therefor from those defendants under the statutes in such case made and provided.

Prayer.

Wherefore your petitioner prays—

(1) Service of a copy of this petition upon said Jno. D. Burnett, district attorney of the United States for this district.

(2) That this court will proceed to hear and determine the matters herein set up and will ascertain and render judgment for him for the amount due him from defendants upon the facts and the law and for his costs in this behalf expended.

(S'gn'd) RICH'D JONES.

Subscribed & sworn to before me this 30th day of March, 1889, as witness my hand and official seal.

[SEAL.] (S'g'd) E. T. BROADWAY,
Dpt'y Clerk U. S. Cir'c't C'rt So. Dist. Alabama.

3

EXHIBIT A.

The United States of America, to Richard Jones, clerk of U. S. dist. court, so. dist. Alabama, Dr.

In $^{3}_{c}$ for fees from July 1 to July 27, 1887.

Items.						
	1887.					
1.	July 1–27.	To filing 3 papers from commissioner in cases from No. 1 to 110, inclusive, 330 pap's @ 10		$33.00		
		Less am't paid, 111 pap's, @ 10		11.00		
					22.00	
						22.00

In $^{3}_{c}$ July 1 to July 30, 1888.

	1888.					
2.	July 13.	To issuing 2 subpa's, 50; ent'r'g ret., 30; & filing, 20		1.00		
		Less 1 do. do. do. do. allowed		.50		
					.50	
		In case No. 245.				
3.	July 18.	To entering motion to quash & order overruling			.15	
4.	" 30.	Balance due on $^{3}_{c}$ R. Jones for fees July 1st, July 30, '88. Audited & allowed by First Comptroller per $^{3}_{c}$ No. 110677, but subsequently withheld			107.25	
						107.90

In $^{3}_{c}$ July 30th to Dec'r 31st, 1888.

	1888.					
5.	July 30.	Entering 6 orders approving U. S. officers' accounts, 1 fol. each, = 6 fol., @ 15			.90	
6.		Making 2 copies each of said 6 orders, being 12 copies, 1 fol. ea., = 12 fol., @ 10			1.20	
7.		Attaching 12 certificates to copies, @ 15			1.80	
8.		" 12 seals " " @ 20			2.40	
9.	Oct. 1.	Entering 18 orders approving U. S. marshal's accounts, 1 fol each, = 18 fol., @ 15			2.70	
10.		Making 2 copies each do. do., 36 fol., @ 15			3.60	
11.		Attaching 36 certificates do., @ 15			5.40	
12.		" 36 seals do., @ 20			7.20	
13.	Nov. 10.	Entering 5 orders approving U. S. marshal's $^{3}_{c}$, 1 fol. each, 5 fol., @ 15			.75	
14.	Nov. 10.	Making 2 copies each of above orders, 10 fol., @ 10			1.00	
15.		Attaching 10 certificates " " 15			1.50	
16.		" 10 seals " " 20			2.00	
17.	Nov. 20.	Making 2 copies of order for marshal to pay supervisors of election, 8 fol		.80		
		Attaching 2 certificates do., @ 15		.30		
		" 2 seals, do., 20		.40		
		Making 2 copies of order for marshal to pay special deputies, 10 fol. ea., = 20 fol		2.00		
		Attaching 2 certificates		.30		
		" 2 seals		.40		
				4.20		
		Less am't audited & paid		2.00		
					2.20	
18.	" 28.	Filing U. S. marshal's $^{3}_{c}$ cur't, 8th report, abstract & vouchers, fiscal year 1888, = 83 pap's, @ 10			8.30	
19.		Filing marshal's $^{3}_{c}$ cur't, 9th report, abs'r't & vouch's, fiscal year 1889, = 20 pap's, @ 10			2.00	
20.		Filing marshal's $^{3}_{c}$ cur't, 11th abs't & vouch's, fiscal year 1888, 279 pape's, @ 10			27.90	
21.		Filing marshal's $^{3}_{c}$ cur't, 13th report, abs't & vouch's, fiscal year 1889, 111 pap's, @ 10			11.10	
22.	Dec. 19.	Filing marshal's $^{3}_{c}$ cur't, 10th report, abs't & vouche's, fiscal year 1887, = 39 papr @ 10			3.90	
23.		Filing marshal's $^{3}_{c}$ cur't, 14 report, abstr't & vouchers, fiscal year 1888, = 40 pap's, @ 10			4.00	

EXHIBIT A.—*The United States of America, to Richard Jones, etc.*—Continued.

Items.				
	1888.			
24.	Dec. 24.	Final record, recording bonds and commitments in the following cases, to wit: Nos. 8, 9, 10, 13, 40, 112, 118, 251, 252, 254, 258, 259, 260, 261, 262, 264, 265, 266, 267, 268, 274, 275, 276, 277, 278, 279, 280, 281, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296,		
5]		297, 299, 303, making a total of 328 folios, @ 15c	$49.20	
		Less am't paid by U. S. Gov't	1.80	
			47.40	
				137.25
		$^{a}_{c}$ rendered January 14th, 1889.		
	1888.			
25.	Feb'y 27.	To filing U. S. marshal's $^{a}_{c}$ current, 1st report, abstract & vouchers, fiscal year, 1888, 39 papers, @ 10	3.90	
26.		Filing U. S. marshal's $^{a}_{c}$ current, 4th report, abstract & vouchers, fiscal year 1888, 19 papers, @ 10	1.90	
27.		Filing U. S. marshal's $^{a}_{c}$ current, 5th report, abstract & vouchers, fiscal year 1888, 14 papers, @ 10	1.40	
28.		Filing U. S. marshal's $^{a}_{c}$ current, 7th report, abstract & vouchers, fiscal year 1888, 24 papers, @ 10	2.40	
				9.60
		Total		$276.75

E. & O. E.

6

EXHIBIT B.

The United States of America to Richard Jones, clerk of the district court of the United States for the southern district of Alabama, dr.

For fees disallowed by the First Comptroller of the Treasury as, to wit:

In $^{a}_{c}$ for fees from July 1 to July 27th, 1887.
First Comptroller's $^{a}_{c}$, No. 104260.

Item 3. Disallowed charges for filing more than one paper from commissioner the three papers should be fastened together and filed as one, 110 @ 20 — 22.00

In $^{a}_{c}$ for fees from July 1st to July 30th, 1888.
First Comptroller's $^{a}_{c}$, No. 110677.

" 1. General $^{a}_{c}$, two subpœnas charged July 13, one disallowed as unnecessary — .50

" 4. No. 245, "entering motion to quash" disallowed. U. S. not liable — .15

Deduct disallowances in former account as recommended, examiner Department of Justice in his report dated July 10th, 1888 — $151.35
Less cash paid by U. S. Mch. 13, 1889 — 44.10
107.25 — 107.90

In $^{a}_{c}$ for fees from July 31st to Dec. 31st, 1888.
First Comptroller's $^{a}_{c}$, No. 113110.

" 1. Charges for approving U. S. officer's $^{a}_{c}$s are not payable by U. S — 7.65

7] Item 2. ($^{a}_{c}$ 113110.) When order to pay supervisors or special deputies is entered on the minutes only one copy is necessary. Balance disallowed as excessive — 1.40

" 3. Charge for seals to copies for marshal disallowed as unnecessary — .80

" 4. In final record, bonds, & justification of sureties and commitments are disallowed as unnecessary — 47.40

137.25

EXHIBIT B.— *The United States of America to Richard Jones, etc.*—Continued.

Item 4. In $\frac{3}{4}$c for fees from July 1, '87 to June 30, 1889.
First Comptroller's $\frac{3}{4}$c. No. 113109.

Fees for filing U. S. officers' accounts not payable by U. S. (also separate fee should not be charged for filing each voucher)..... 9.60

Total..... 8276.75

E. & O. E.

I acknowledge that the petitioner within named has caused service to be made on me this day of a copy of the within petition and its exhibits. Witness my hand this 30th March, 1889.

(Sig'd) JNO. D BURNETT,
U. S. Attorney.

Filed Mc'h 30, 1889.
(Sg'd) RICH'D JONES, *Clerk.*

8 U. S. district court, so. district Alabama.

RICHARD JONES
vs. } 40. At law.
THE UNITED STATES.

By petition of plaintiff.

Personally appeared before me, E. T. Broadway, deputy clerk of the U. S. circuit court for the southern district of Alabama, Richard Jones, the petitioner in the above stated cause, who, being sworn by me in due form of law, deposes and says: That on the 30th day of March, 1889, he caused to be served on Jno. D. Burnett, U. S. attorney for said district, a copy of a petition filed by him in said district court on that day, wherein he claims that said United States is indebted to him in the sum of two hundred and seventy-six $\frac{75}{100}$ dollars ($8276\frac{75}{100}$) for services rendered by him in his official capacity as clerk of said U. S. district court between July 1st, 1887, and December 31st, 1888, inclusive.

The deponent further says that on the 2nd day of April, A. D. 1889, he mailed, by a registered letter, a copy of said petition, addressed to "The Attorney-General, U. S., Washington, D. C."

All in conformity with the provisions of sec. 6, act of Cong., U. S., entitled "An act to provide for the bringing of suits against the Government of the United States," approved March 3rd, 1887.

(Sg'd) RICH'D JONES.

Sworn to & subscribed before me this 2d day of April, A. D. 1889.
(Sg'd) E. T. BROADWAY,
Dp'ty Clerk U. S. Circuit Court, So. Dist. Ala.

Filed April 2, 1889.
(S'd) RICH. JONES, *Clerk.*

9 District court of the United States for the southern district of Alabama.

RICHARD JONES
vs. } 41. At law.
THE UNITED STATES.

Petition of Richard Jones for fees disallowed him as clerk.

To Hon. District Court:

The petition of Richard Jones respectfully shows to the court that he is a resident of the city of Mobile, in this southern district of Alabama, and he was duly appointed clerk of the United States district court of said district, qualified, and was in the due performance of his duties from July 1, 1887, down to the present time.

That as such clerk he has within said period performed sundry services for the United States for which fees are allowed him by law against these defendants; that he has from time to time duly made up his accounts of fees, presented the same to this court in the presence of Hon. Jno. D. Burnett, district attorney; that said accounts were approved by the court; and thereupon by this petitioner duly rendered the accounting officers of the defendants at Washington. Duplicates thereof were filed in this court in accordance with law.

Petitioner shows that the greater portion of said accounts was allowed by said defendants as presented, but that sundry items were dis-
10 allowed and refused payment, amounting in all to $156\frac{95}{100}$. An itemized statement of the charges so disallowed is hereto annexed as Exhibit "C," and prayed to be taken as a part of this petition. Petitioner shows that the disallowances so made are on file in this court, and a copy of the statement thereof, so far as affects the fees now sued for, is hereto attached, marked Exhibit "D," and prayed to be taken as a part of this petition.

Petitioner shows that the services for which fees were so disallowed were duly rendered defendants, and the fees charged were in strict accordance with the law, and he hereby claims said fees therefor from these defendants under the statutes in such case made and provided.

Prayer.

Wherefore your petitioner prays—

(1) Service of a copy of this petition upon said John D. Burnett, district attorney of the United States for this district.

(2) That this court will proceed to hear and determine the matters herein set up, and will ascertain and render judgment for him for the amount due him from defendants upon the facts and the law and for his costs in this behalf expended.

(S'g'd) RICH'D JONES.

Subscribed & sworn to before me this 18th day of April, 1889, as witness my hand & official seal.

[SEAL.] (S'g'd) E. T. BROADWAY,
Dp'y Clerk U. So. Ct Court, So. D. Ala.

HAMILTON & GAILLARD,
Att'ys. for Petitioner.

11 EXHIBIT C.

United States of America, to Richard Jones, clerk, of the district court of the United States for the southern district of Alabama, Dr.

For fees disallowed by First Comptroller of the U. S. Treasury, from Jan. 1 to March 30, 1889, to wit:

Items.	1889.			
29	Jany. 16.	Entering on minutes 5 orders approving marshal's a/c., 1 fol., each 15c	.75	
30		Making 2 copies each above orders, 10 fol., 10	1.00	
31		Attaching 10 certificates, @ 15	1.50	
32		" 10 seals, @ 20	2.00	
33	"	30. Entering on minutes order approving U. S. counsr. a/c.	.15	
34		Making copy do., 10; certificate, 15; & seal, 20	.45	
35	Feb.	4. Entering on minutes 2 orders approving U. S. marshal's a/c., 1 fol. ea., 2 fol., @ 15	.30	
36		Making 2 copies do., each order, 4 fol., @ 10	.40	
37		Attaching to do. 4 certificates, @ 15	.60	
38		" " do. 4 seals	.80	
39	"	18. Entering on minutes 5 orders approving U. S. marshal's a/c., 1 fol. ea., 5 fol., @ 15	.75	
40		Making 10 copies above order, 10 fol., @ 10	1.00	
41		Attaching 10 certificates, @ 15	1.50	
42		" 10 seals, @ 20	2.00	
43	"	23. Entering on minutes 6 orders approving U. S. marshal's a/c., 1 fol. ea., 6 fol., @ 15	.90	
44		Making 2 copies ea. order, 12 fol., @ 10	1.20	
45		Attaching 12 certificates, @ 15	1.80	
46		" 12 seals @ 20	2.40	
47		Entering on minutes order approving U. S. atty. a/c.	.15	
48		Making copy do., 10; certificate, 15; seal, 20; and filing, 10	.55	
12]	49 Mch. 1.	Filing U. S. marshal's a/c., recapit; stat., etc., fiscal year 1889, 85 papers, @ 10	8.50	
50		Filing U. S. marshal's 85th a/c. recapit. stat, etc., fiscal year 1889 = 52 papers, @ 10	5.20	
			33.90	
		Add error in deducting this amount more than was originally charged in acct.		
51		For entering orders approving U. S. officers' a/c	1.05	34.95
52		Issuing copies scire facias in cases Nos. 34, 35, 36, 37, 38, 39=total, 17 copies, @ 2	3.40	
		Less amount paid	.60	2.80
53		Making 2 copies of orders to pay witnesses, 32 fol. ea.= 64 fol., @ 10	6.40	
		Attaching do. 2 certificates, 15	.30	
		Making 2 copies of orders to pay jurors, 12 fol. ea.= 24 fol., @ 10	2.40	
		Attaching do. 2 certificates, @ 15	.30	
			9.40	
		Less amount paid	4.20	5.20
54		Attaching 8 seals to copies of orders to pay witnesses and jurors, @ 20		1.60
55		Making duplicate report from No. 1 (sent Solicitor U. S. Treas'y) to file 3 fol., @ 15 and filing, 10	.55	
		Making duplicate report, form No. 7 (Solicitor Treas.), to file 24 fol., @ 15 and filing, 10	3.70	
				4.25

EXHIBIT C.—*United States of America, to Richard Jones, etc.*—Continued.

Items.	1889.			
56	Mch. 1.	Making final record in cases Nos. 3, 28, 121, 125, 141, 233, 234, 235, 236, 237, 238, 239, 240, 241, 244, 245, 246, 247, 248, 249, 250, 253, 255, 256, 257, 263, 269, 270, 271, 272, 273, 282, 298, 300, 302, 304, 305, 306, 308, 309, 311, 312, 313, 314, 315, 316, 317, 320, 321, 322, 323, 324, 327, 328, 329, 330, 331 = total folios 1157, *a* 15c	173.55	
		Less amount paid	81.00	
				92.55
13]	57.	Entering on subpœna record 104 witness certificates stating days attended, mileage, amounts, etc., issued in cases Nos. 28, 121, 125, 233, 234, 235, 236, 237, 238, 241, 244, 246, 249, 250, 253, 256, 269, 270, 271, 273, 282, 298, 300, 302, 304, 305, 306, 308, 309, 310, 311, 312, 313, 314, 315, 318, 319, 320, 321, 322, 324, 325, 326, 327, 328, 330, 331 = 104 certificates en'r'd, *a* 15		15.60
		Total		156.95

EXHIBIT D.

United States of America, to Rich'd Jones, cl'rk U. S. dist. court, so. dist. of Alabama, for fees from Jan'y 1 to M'ch 30, A. D. 1889, Dr.

Fees disallowed in 1st Comptroller's report No. 113821, to wit:

Item 1.	Charges in relation to approval of U. S. officers' bonds disallowed as not chargeble to U. S	34.95
" 2.	All charges for copies sci. fa. disallowed, charges for original covers, cost of necessary copies	2.80
" 3.	More than one copy of order to pay witnesses, with certificate to same, dissallowed as unnecessary	5.20
" 4.	Duplicate reports to Solicitor Treas'y disallowed as unnecessary	4.25
" 5.	Seals to copies of orders to pay witnesses, " " "	1.60
" 6.	In final record, indictment, or information, 1 cop. ea., pleas, jury, final verdict, & judgment are allowed; balance disallowed as unnecessary. In cases no' prossed, only order of nol. pros. is allowed. Final record of bonds is unnecessary.	92.55
" 7.	Charge for entering certificates for payment of witnesses disallowed as unnecessary; charge for issuing certificate for each witness is allowed; also for entering one general order to pay witnesses	15.60
	Total	$156.95

Filed April 18th, 1889.
(Sgd) RICH'D JONES, *Clerk.*

14 U. S. district court, so. district of Alabama.

RICHARD JONES
vs.
UNITED STATES. } 41. At law.

I hereby acknowledge service of a copy of the petition in above-stated cause on this 19th day of April, 1889.
(Sgd) JNO. D. BURNETT,
U. S. Attorney.

Filed April 20th, 1889.
(Sgd) RICH'D JONES, *Clerk.*

Affidavit of service.

U. S. district court, so. district of Alabama.

RICHARD JONES
vs. } 41. At law.
UNITED STATES.

Personally appeared before me, E. T. Broadway, deputy clerk of the U. S. circuit court for the southern district of Alabama, Richard Jones, the petitioner in the above-stated cause, who, being sworn by me in due form of law, deposes and says that on the 19th of April, 1889, he mailed, by a registered letter, addressed to "the Attorney-General U. S., Washington, D. C.," a copy of a petition filed by him in said district court on the 18th of April, 1889, wherein he claims that said United States is indebted to him in the sum of $156\frac{95}{100}$ for services rendered in his official capacity as clerk of said U. S. district court from January 1st to March 30th, A. D., inclusive.

15 The deponent further says, that he has also caused a copy of said petition to be served upon the district attorney of the United States in and for the aforesaid judicial district, all in conformity with the provisions of sec. 6, of an "act of the Congress of the United States entitled "An act to provide for the bringing of suits against the United States Government," approved March 3rd, 1887.

(S'g'd) RICH'D JONES.

Sworn to and subscribed before me this the 7th day of May, A. D. 1889.

(S'g'd) E. T. BROADWAY,
D'pt'y Clerk U. S. Circuit Court Sou. Dist. of Ala.

Filed May 7th, 1889.

RICH'D JONES,
Clerk.

U. S. district court, sou. district of Alabama, June term, A. D. 1889.

Present, Hon. Harry T. Toulmin, judge, presiding.
From minutes July 20th, 1889, p'ge 171.

RICHARD JONES
vs. } 40 & 41. At law.
UNITED STATES.

These causes coming on to be heard and the issues being the same, it is ordered that they be consolidated and tried as one cause. And upon the pleadings, proof, and argument of counsel pro and con the same was taken under consideration by the court for future determination.

16 *Plea as to jurisdiction.*

District court of the United States for the southern district of Alabama.

RICHARD JONES
vs. } 40 & 41. At law.
UNITED STATES.

It is hereby admitted and agreed by the counsel representing the parties at interest in above-consolidated causes that the defendant plead in open court to the jurisdiction of the court in the trial of said causes, and

that the plaintiff demurred to said plea of jurisdiction, and upon consideration thereof the court sustained said demurrer and proceeded with the trial of said cause.

(S'g'd) M. D. WICKERSHAM,
U. S. Attorney, S. D. Ala.
" HAMILTONS & GAILLARD,
Atty's for Plaintiff.

Filed July 20th, 1889.
(S'g'd) RICHD. JONES, *Clerk.*

Plea of offset.

RICHARD JONES
vs. } 40 & 41. At law.
UNITED STATES.

Now comes the defendant, and pleads as an offset to the plaintiffs' claim in above-entitled suit one hundred & seven $\frac{75}{100}$ dollars, which the evidence in the cause shows to be an account stated.

(S'g'd) M. D. WICKERSHAM,
U. S. Attorney.

Filed July 20, 1889.
(S'g'd) RICH'D JONES, *Clerk.*

17 *Plea of general issue.*

District court of the United States for the southern district of Alabama.

RICHARD JONES
vs. } 40 & 41. At law.
THE UNITED STATES.

Now comes the defendant in the above-entitled consolidated causes, and pleads the general issue.

(S'g'd) M. D. WICKERSHAM,
U. S. Attorney.

Filed July 20th, 1889.
(S'g'd) RICH'D JONES, *Clk.*

Testimony. Plaintiff. Testimony.

RICHARD JONES
vs. } At law. Consolidated causes 40 & 41.
UNITED STATES.

This cause coming on to be heard, comes Richard Jones, the plaintiff, who, being duly sworn in open court, testifies in his own behalf as follows: My name is Richard Jones. I am the plaintiff in this cause. I was appointed clerk of the district court of the United States for the southern district of Alabama on the 1st day of February, A. D. 1887. The petition, with accounts attached, marked Exhibits A & B, filed March 30th, 1889, claiming $276.75 for various items approved in the district court, disallowed by the accounting officers of the U. S. Treasury, is for services rendered from July 1st, 1887, to January 1st, 1889. I performed the services and charged for the said services the various
18 items as stated in said Exhibits A & B, and now produce the records and papers filed in the said district court for proof of the

same. It so happened that the two witnesses from an interior county were placed in one subpœna to be executed instanter in that county. I learned that one of them was in Mobile, where the court was sitting, and therefore issued a separate subpœna for him. That is the service marked Item 2. Item 3 was really entering order overruling a motion to quash. The charge was not for entering the motion, although I may have expressed it awkwardly. Item 4 is the balance unpaid on an account for $493.00, which was allowed in full by the Comptroller. The copies of orders, certificates, and seals charged for in the consolidated petition, &c., were for the marshal to attach to his original and duplicate accounts with the Government.

The petition, with accounts attached, marked Exhibits C & D, filed April 18, 1889, claiming $156.95, is for various items approved by the district court, but disallowed by the accounting officers of the U. S. Treasuty, for services rendered from January 1st, 1889, to March 30th, 1889. I performed the services and charged for the said services the various items as stated in the account attached to petition marked Exhibit C, and now produce the records and the papers filed in said district court in proof of the same.

19 Items 54 and 55 are duplicates of reports to the Solicitor of the Treasury, made and kept as office papers. Item 57 is for keeping a record of witness certificates, showing causes, witnesses, and all the items making up the certificates issued, and the return of the marshal. This was warmly approved by Examiner Hardin. I do not go into the other items in detail, as they explain themselves.

(N. B.—It is agreed that the witness duly proved by the court records the actual rendition of services charged for.)

The different department regulations bearing on the matters in controversy were duly introduced.

Mr. Richard Felder, the managing U. S. deputy marshal, was examined, and showed the method of approving U. S. officers' accounts under act of 1875, and that the duplicate court orders were endorsed on the original and duplicate accounts.

Testimony taken in open court and filed July 20th, 1889.

RICH'D JONES,
Clerk.

20 *Testimony by d'f'd't.*

Copy 3d, 84. Paragraph of order of circuit judge of October 5th, 1881.
United States of America. Fifth judicial circuit.

Order of court.

Considering the representations and requests of the Department of Justice,

1st. It is hereby ordered by the court, that * * *

2nd. It is further ordered, that whenever a * * *

3rd. It is further ordered by the court, that each commissioner shall keep a well-bound book as a docket, in which he shall enter on the day the transactions occur, the issuing of each warrant, upon whose complaint and request the same was issued, the nature of the offense, the officer to

whom the warrant was delivered for service, together with the proceedings had under such warrant; there shall be entered the names of the witnesses present and examined, and their fees, the name of the guard, if any, and his fees, together with the marshal's or deputy marshal's fees; and all of said fees, together with mileage and expenses allowed by law, and a statement of the commissioner's own fees, shall be properly entered upon the warrant when returned to the commissioner. After the close of each examination the commissioner shall forward to the clerk of the United States circuit court for the proper district all the papers in the case,
21 with a proper transcript of the proceedings in which he shall schedule the papers forwarded.

4th. It is further ordered by the court, that at the end of each month, or within five days thereafter, each commissioner shall make out and forward to the clerk of the United States circuit court for the proper district a report in duplicate of all cases instituted or examined during the month, one for the clerk, the other for the Attorney-General, and a separate report of internal revenue cases instituted or examined, for the Commissioner of Internal Revenue. The report to be made upon such forms as shall be prescribed and furnished by the Department of Justice, and they shall give a full abstract of the proceedings in each case.

5th. It is further ordered that upon * * *

(Signed) DON. A. PARDEE,
Circuit Judge 5th Circuit U. S.

Filed Oct. 5, 1881.
(Sgd.) N. W. TRIMBLE, *Clerk.*

Certificate.

I, N. W. Trimble, clerk of the circuit court of the United States for the 5th judicial circuit and so. dist. of Alabama, hereby certify the foregoing to be a full, true, and correct copy of the 3rd and 4th paragraph, of the order of court of October 5, 1881, as the same now appears of record and on file in my office.

Witness my hand and the seal of said court, affixed this 20th day of July, A. D. 1889.

[SEAL.]
(Sgd.) N. W. TRIMBLE, *Clerk.*
Clerk's fee, 80 cents.
Filed July 20, 1889.
(Sgd.) RICH'D JONES, *Clerk.*

22 *Opinion.*

District court of the United States for the Southern District of Alabama.
Hon. Harry T. Toulmin, judge.

RICHARD JONES *vs.* THE UNITED STATES. } At law. Nos. 40 & 41 consolidated causes.

The plaintiff sues to recover certain fees, claimed to be due him as clerk of said court, and which are specifically set forth in the accounts annexed to the petition filed in the cause. It is not denied that the services charged

for were performed, but compensation for them has been disallowed, either on the ground that the same is not payable by the United States, or that the services were not necessary or required.

Item 1.—My opinion is that the plaintiff is entitled to fees for filing at least three papers from commissioners, viz: the process, or copy of process, the bail bond, and the recognizance of witnesses. These papers are required by law to be returned to the clerk of the court, and when they come to his office in contemplation of section 1014 of the Rev. Stat. U. S., and of section 4298 & 4425 Code of Alabama, they should be filed by him for identification and ready reference. He charges for filing three separate papers in each case from commissioners, which he is allowed. (Rev. Stat., sec. 828.)

23 Item 2. The rule is that there should be but one subpœna issued for all the witnesses in a cause; but this rule is subject to exceptions. The proof brings this case within the exceptions, and shows that the issue of the subpœna charged for was necessary and proper. The plaintiff is entitled to the fee charged therefor.

Item 3. He is entitled to the fee for entering order overruling motion to quash indictment He is required to enter all the orders of the court (Rev. Stat., §. 794), and the statute provides for such service. The proof shows that item was for this service and not for entering the motion to quash, as appears from the face of the account.

Item 4. The proof shows that the services charged for and covered by this item were not only actually performed, but that the account therefor had been stated and allowed by the Treasury Department. It became then a stated account; but the Government claims that it was improperly allowed and paid; seeks to recharge it against the plaintiff, and now pleads a set-off to the extent of said item. This is an affirmative plea, and it devolves on the Government to sustain it by proof, which it fails to do.

Items 5 to 16 inclusive. The charges for entering orders of the court approving marshal's accounts are allowed as legal and proper

24 charges. The law requires such orders to be made, and it is the duty of the clerk to enter them up, and certified copies of such orders are required to be attached to said accounts and to be forwarded to the Treasury Department. The clerk is entitled to his fees for entering the orders and for making certified copies of them, and these fees are justly chargeable to the Government. But I do not think the clerk is entitled to be paid for two copies of the same order. The law requires the account to be made in duplicate, but not the order approving the account. The original account, with a certified copy of the order, is forwarded to the Treasury Department, and the duplicate account is retained by the clerk and filed in his office. Only one copy of the order then is necessary.

Item 17. What is said as to the charges for copies of orders approving the marshal's accounts is applicable to the charges made for copies of orders for marshal to pay supervisors of election and special deputies, seals to copies of orders for marshal to pay supervisors, special deputies, and witnesses, &c., are, in my opinion, not necessary and the charges therefor not allowable, unless they are required by some regulation of the department of which I am not advised.

Items 18 to 23 and 25 to 28, inclusive, & item 49. These are
25 charges for filing the marshal's accounts and vouchers. The law requires this service of the clerk, presumably for the convenience and protection of the Government. He is entitled to his fees for it and they are clearly chargeable to the Government. Each should be filed separately for easy identification and ready reference.

Items 24 & 56. Charges for making final record. It is the duty of the clerk to record, after the determination of any prosecution, all the proceedings of the court relating thereto. It seems to me clear that an order of commitment made by the court is an important part of the proceedings in a criminal cause, and that it should be made a matter of record. But I think it equally clear that a justification of sureties on a bail bond taken by the committing magistrate is no part of the proceedings of the court, and that its entry on the record is unauthorized and unnecessary, and the same may be said as to the bond itself. The charge for the two items last mentioned is not allowed.

Items 29 to 48, inclusive. These are charges for entering orders approving marshal's, commissioners, and district attorney's accounts. What has already been said as to items 5 to 16, inclusive, applies to these items.

26 Item 52. Charges for scire facias.

They are legal and proper, and are allowed. Whenever an undertaking of bail is forfeited by the failure of the defendant to appear as required, a conditional judgment must be rendered in favor of the United States against the parties to the undertaking for the sum therein expressed, and a notice of the rendition of such judgment must be issued by the clerk to each defendant. This notice is called scire facias, and is in the nature of a writ. * * * Code Alabama, § 4434 & 4869. The clerk is entitled to a fee for each writ issued by him. Rev. Stat., § 828. The proceeding by scire facias is a civil action, and the notices issued in them are original. These must be executed by the marshal and should be returned by him with the proper return thereon endorsed. The usual mode of executing process of this character is by leaving a copy of it with the defendant.

Items 53 & 54. What I have said under item 17, as to charges for copy of order for marshal to pay supervisors and special deputies and as to the necessity for seals to such copies, applies to the charges for copies of orders to pay witnesses and jurors and seals thereto.

Item 55. The charge for making duplicate report to the Solici-
27 tor of the Treasury is not required by law or the regulations of the Department, is unnecessary, and is not allowed.

Item 57. This charge for entering certificates for payment of witnesses is disallowed, as not required by law and unnecessary in the manner and form in which the same is made. When the court causes an order to be entered for the payment of witnesses the clerk should enter on the record the names of such witnesses, stating days attended, mileage, and amounts, &c., and for this service he is entitled to be paid for making the record. And it is the duty of the clerk to keep a subpœna record for all cases, in which must be entered the cases in which any subpœnas issue, the names of the witnesses, the time of the issue, and the return of the marshal. For making this record he is entitled to compensation. But I do not understand from the accounts sued on and from the proof submitted that the charge made is for making either of the records referred to.

As bearing on many of the questions raised in this case, and as sustaining my conclusions on them, I cite the following: Goodrich vs. U. S., 35 Fed. Rep., 193; Stanton vs. U. S., 37 Fed. Rep., 252; Erwin vs. U. S., 37 Fed. Rep., 470.

Finding of facts.

28 1. That the plaintiff is the clerk of the United States district court for the southern district of Alabama, and was such clerk on and before July 1st, 1887.

2. That he, as such clerk, actually performed the services charged for in the accounts sued on as therein stated.

Conclusion of law.

That the plaintiff is entitled to have and recover from the United States the sum of two hundred and ninety-two $\frac{35}{100}$ dollars ($292\frac{35}{100}$) as due him on said accounts.

Judgment.

The court, on due consideration of the premises, finds for the plaintiff, and doth order, adjudge, and decree that the said Richard Jones do have and recover of and from the United States the sum of two hundred and ninety-two and $\frac{35}{100}$ dollars, together with the costs of this suit.

29 *Petition of defendant for appeal.*

District court of the United States for the southern district of Alabama.

RICHARD JONES
vs. } At. law. Nos. 40 & 41. Consolidated causes.
THE UNITED STATES.

To the honorable Harry T. Toulmin, judge of the district court aforesaid:

Your petitioner, the United States, through its attorney, M. D. Wickersham, respectfully shows unto your honor that Richard Jones, the claimant in the above-entitled consolidated causes, presented to this honorable court two certain petitions for fees disallowed him as clerk of said court and marked filed March 30th, 1889, and April 18th, 1889, respectively, in the first of which said claimant sued the United States for fees amounting to two hundred and seventy-six $\frac{75}{100}$ dollars, as set out and will more fully appear in the account attached to said petition filed March 30th, 1889, and in the latter also sued for fees amounting to one hundred and fifty-six $\frac{95}{100}$ dollars, as will more fully appear in the account annexed to said petition filed April 18th, 1889, which petitions and accounts thereto annexed are hereby referred to and prayed to be taken and considered as forming a part and parcel of this petition.

Your petitioner further shows to your honor that on July 20th, 1889, your petitioner, as defendant in said above-entitled causes, interposed three separate pleas, to wit:

1st. Plea to the jurisdiction of the court; 2nd, plea of general
30 issue; and 3rd, plea of set-off for one hundred and seven $\frac{25}{100}$ dollars, which the evidence shows to be an account stated.

Your petitioner further shows that on said 20th July, 1889, an order was made and entered consolidating both of the petitions aforesaid.

Your petitioner further shows that said claimant demurred to your petitioner's plea to the jurisdiction of the court, and this honorable court sustained said demurrer on said 20th July, 1889.

Your petitioner further shows to your honor that on the date of the trial of the above consolidated causes, to wit, July 20th, 1889, the order of the circuit judge, Hon. Don A. Pardee, dated October 5th, 1881, was introduced as evidence in said causes, and a copy of an extract of same filed as evidence, whereby it will appear that the commissioners were ordered, after the close of each examination, to "forward to the clerk of the United States circuit court for the proper district all the papers in the case, with a proper transcript of the proceedings, in which he shall schedule the papers forwarded."

Your petitioner further shows unto your honor that on August 7th, 1889, judgment was rendered in said above-entitled causes in favor of claimant for the amount of two hundred and ninety-two $\frac{35}{100}$ dollars, together with costs, in which said judgment is included an allowance for filing papers from commissioners, amounting to twenty-two dollars, and also the amount of one hundred and seven $\frac{90}{100}$ dollars, which was
31 pleaded as an offset by your petitioner.

Wherefore your petitioner, by direction of the Attorney-General of the United States, prays that an appeal from said judgment be allowed to the next term of the Supreme Court of the United States, and that citation be directed to Richard Jones, the claimant aforesaid, and for grounds for said appeal your petitioner assigns as errors the following, to wit:

1st. That this court erred in sustaining claimant's demurrer to your petitioner's plea to the jurisdiction of this court.

2nd. That this court erred in overruling your petitioner's plea to the jurisdiction of this court.

3rd. That this court erred in overruling your petitioner's plea of offset, and in allowing the claimant as part of the judgment the sum of one hundred and seven $\frac{90}{100}$ dollars pleaded as such offset.

4th. That this court erred in allowing claimant as a part of his judgment the sum of twenty-two dollars for filing papers from commissioners, the same being filed in contradiction of the order of the circuit judge dated October 5, 1881, which requires such filing to be done by the clerk of the circuit court, a copy of an extract of which order is in evidence in these consolidated causes.

And as in duty bound your petitioner will ever pray.

(Signed) M. D. WICKERSHAM,
Attorney for U. S.

Filed July 20th, 1889.
(S'g'd) RICH'D JONES, *Clerk.*

32 *Citation of appeal.*

Supreme Court of the United States.

UNITED STATES, APPELLANTS,
vs.
RICHARD JONES, APPELLEE. } Citation.

By the honorable Harry T. Toulmin, judge of the district court of the United States for the southern district of Alabama. To Richard Jones, esq.

Whereas the United States has lately appealed to the Supreme Court of the United States from a decree or judgment lately rendered in the district court of the United States for the southern district of Alabama, made in favor of you, the said Richard Jones, as clerk of said district court, for the sum of two hundred and ninety-two $\frac{35}{100}$ dollars. You are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Mobile, in the southern district of Alabama, in the fifth judicial circuit, the 11th day of November, in the year of our Lord one thousand eight hundred and eighty-nine.

(Signed,) HARRY T. TOULMIN,
Judge U. S. Dist. Court, Sou. Dist. of Ala.

Filed November 12th, 1889.
(S'g'd,) RICH'D JONES, *Clerk.*

33 District court of the United States for the southern district of Alabama.

RICHARD JONES
vs.
THE UNITED STATES. } At law. Nos. 40 & 41. Consolidated causes.

In the above consolidated causes, it appearing to the court that on the 7th day of August, 1889, the same being a day of the regular June term, 1889, thereof, judgment was rendered in favor of the claimant, Richard Jones, for the amount of two hundred and ninety-two $\frac{35}{100}$ dollars, together with costs, and the defendant, the United States, by its attorney, M. D. Wickersham, esq., now coming and presenting to this court its petition, praying an appeal from said judgment to the next term of the Supreme Court of the United States, it is, on consideration thereof, ordered, adjudged, and decreed that the prayer of said petition be and the same is hereby granted, and an appeal is hereby allowed as prayed.

Nov. 12th, 1889.
(S'g'd) HARRY T. TOULMIN, *Judge.*

Entered on minutes, p'ge 195, and filed November 12th 1889.
(S'g'd,) RICH'D JONES, *Clerk.*

34 Supreme Court of the United States.

UNITED STATES, APPELLANT,
vs.
RICHARD JONES, APPELLEE.

Appeal from the district court of the United States for the southern district of Alabama to the Supreme Court of the United States.

To the Hon. Supreme Court of the United States:

The appeal of the United States, the above-named defendant and appellant, respectfully showeth:

That upon the 30th day of March, 1889, the above-named claimant, Richard Jones, filed his petition in the district court of the United States for the southern district of Alabama against the above-named defendant and appellant, claiming and suing for fees for services performed by him as clerk of said district court, amounting to two hundred and seventy-six $\frac{75}{100}$ dollars, as set out in an account attached to his petition and which had been disallowed him by the accounting officers of the Treasury.

That upon the 18th day of April, 1889, the above-named claimant filed a further petition in said district court against said defendant and appellant, claiming and suing for fees for other services performed by him as clerk as aforesaid, amounting to one hundred and fifty-six $\frac{95}{100}$ dollars, and that both of said petitions were filed by said claimant under the act

35 of March 3rd, 1887, chap. 359, entitled "An act to provide for the bringing of suits against the Government of the United States."

That on July 20th, 1889, the above-named defendant and appellant, as defense to said petitions, interposed and filed in said district court three separate and distinct pleas, to wit:

1st. Plea to the jurisdiction of the court;

2d. Plea of general issue; and

3d. Plea of set-off for one hundred and seven $\frac{25}{100}$ dollars, which the evidence shows to be an account stated; and that claimant demurred to appellant's plea to the jurisdiction of the court, and that the district court aforesaid sustained said demurrer, and on the same day an order was made and entered for the consolidation of both of said petitions hereinbefore described and the causes proceeded with and tried as one.

That on the date of the trial of said causes by the district court aforesaid, to wit, July 20, 1889, the order of the circuit judge, Hon. Don A. Pardee, dated October 5th, 1881, was introduced, and a copy of an extract of said order filed as evidence, whereby it will appear that the commissioners were ordered, after the close of each examination, to "forward to the clerk of the United States circuit court for the proper district all the papers in the case, with a proper transcript of the proceedings, in which he shall schedule the papers forwarded."

That on the 7th day of August 1889, a decree was pronounced in the cause and judgment rendered therein, wherein it was in substance

36 ordered, adjudged, and decreed that said claimant "Richard Jones do have and recover of and from the United States the sum of two hundred and ninety-two $\frac{35}{100}$ dollars, together with the costs," &c.,

and that in said judgment was allowed and included the sum of one hundred and seven $\frac{90}{100}$ dollars, which was pleaded as an offset, and also the sum of twenty-two dollars for filing papers from commissioners, which was contrary to the order of the circuit judge, Hon. Don A. Pardee, dated October 5th, 1881, which was put in evidence in said causes.

Wherefore, this appellant appeals from the whole of said decree and judgment of said district court of the United States, and respectfully prays that the decree and judgment together with opinion of the said district court, and the petitions, pleadings, evidence, and proceedings in the said causes may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said causes anew, and that the said decree or judgment of the district court, and every part thereof, may be reversed, and a decree made dismissing said petitions, with costs, or such other decree as to the said Supreme Court shall seem just.

Dated November 12th, 1889.

(Signed) M. D. WICKERSHAM,
U. S. Attorney for Appellant.

Filed November 12th, 1889.
(Sgd.) RICHD. JONES, *Clerk.*

37 *Costs.*

Rich'd Jones, clerk U. S. D. court, court costs	$10.90
Do making transcript for Attorney-General	9.35
Rich'd Jones, making transcript on appeal	13.85
Hamiltons & Gaillard, attorneys fee	10.00
N. W. Trimble, clerk circuit court	.80
Total	44.90

I, Richard Jones, clerk of the district court of the United States for the southern district of Alabama, hereby certify that the foregoing transcript is a full, true, and correct transcript of the record of the proceedings had in the consolidated causes of Richard Jones against the United States as the same now appears of record and on file in my said office.

Witness my hand and the seal of said district court affixed this 22d day of January, A. D. 1890.

RICH'D JONES,
Clerk U. S. District Court, Sou. Dist. of Alabama.

N. B.—The word items and the numbers 1 to 57 in red ink on the left margins of Exhibits A and C attached to petitions correspond with the numbers of items alluded to in the opinion and in testimony.

38 (Indorsement on cover:) No. 312. The United States, appellant, vs. Richard Jones. 13972. S. Alabama, D. C. U. S. Filed February 20, 1890.